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No. 87-924

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

HENRY J. KAISER COMPANY,
STANDARD OIL COMPANY OF CALIFORNIA,
CHEVRON CHEMICAL COMPANY
AND EUGENE GREEN,
Petitioners,

v.

DONALD PAIGE AND ANDREW HARRIS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where Congress, through the enactment of Fed/OSHA, has declared its intent that the states regulate workplace safety, does Section 301 of the Labor Management Relations Act preempt union employees' state law claim that they were wrongfully discharged for refusing to work under conditions which violated California's health and safety laws?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In 1982, petitioner Henry J. Kaiser Company ("Kaiser") was constructing a coal liquification plant for petitioner Chevron Oil Company ("Chevron") at Chevron's Richmond, California refinery. The plant was four to eight stories in height and consisted primarily of heavy pipe. Respondents Donald Paige and Andrew Harris were employed by Kaiser as welding machine tenders pursuant to a collective bargaining agreement between Kaiser and Operating Engineers Local 3. Respondents spent two to three hours per day fueling the gasoline generators which supplied electricity to the arc welders who were working throughout the structure.

Kaiser required Paige and Harris to fuel the generators under extremely dangerous conditions which violated the California

Occupational Safety and Health Act ("Cal/OSHA")[1]. Specifically, Kaiser provided Paige and Harris with two defective five-gallon cans for carrying gasoline to the generators. Neither can had a spark arrestor; both were beaten up. One can had a defective latch which permitted gas to spill out. To reach a generator which needed refueling, Paige and Harris had to walk through the job site and under the workers who were welding above them. The welding gave off sparks, which fell on or near them as they carried their damaged and leaking gas cans.

The danger was compounded by Kaiser's insistence that the generator gas tanks be filled even though the engine manifold was hot—a practice which directly violated the instructions printed on each generator. The likelihood of an explosion due to Kaiser's refusal to follow the instructions was greatly heightened by the fact that the funnels on the gas cans were broken and leaked when gasoline was poured into the tank.

For more than a week, Paige and Harris made numerous efforts to have Kaiser correct the dangerous working conditions. Despite these efforts, Kaiser did not replace the defective gas cans and funnels and rejected various alternatives which would have permitted the safe refueling of the generators. On July 26, 1982, having reasonably concluded that conditions would never be made safe and that the risk of a serious explosion was therefore high, Paige and Harris refused to fuel the generators. Kaiser's project supervisor responded by immediately firing them. The next day the project supervisor and a representative from Local 3 discussed the termination at a short meeting from which Paige and Harris were excluded. At the conclusion of the meeting, the Local 3 representative told respondents that nothing could be done about their terminations.

Paige and Harris filed a state court action challenging their termination and the unsafe working conditions. Their complaint alleged seven tort claims under California law: (1) wrongful discharge in violation of California's public policy concerning worksite safety as expressed in Cal/OSHA; (2) wrongful dis-

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[1] Cal. Lab. Code § 6300 *et seq.*

charge in violation of the convenant of good faith and fair dealing; (3) intentional infliction of emotional distress; (4) negligent infliction of emotional distress; (5) assault; (6) "peculiar risk" based on Chevron and Standard's intentional and willful refusal to take precautions against the harm posed by the refueling procedures; and (7) "ultrahazardous activity" based on petitioners' requiring Paige and Harris to perform the task of refueling the generators under ultrahazardous conditions.

The petitioners removed the case to federal court pursuant to 28 U.S.C. § 1441. In response to the parties' cross-motions to remand and for summary judgment, the district court, applying the artful pleading doctrine, found that the claim for wrongful discharge in violation of public policy and the claim for breach of covenant were in fact actions under section 301 of the Labor Management Relations Act (LMRA)[2], and were therefore subject to removal. Having assumed jurisdiction, the court dismissed the two section 301 claims because they were barred by the applicable statute of limitations. With respect to the remaining five tort claims, the court held that they were not artfully pled causes of action, declined to exercise pendent jurisdiction and remanded them to the state court. A-16-19.[3]

Both parties sought appellate review of the district court's decision. Paige and Harris appealed the dismissal of their claim for wrongful discharge in violation of public policy[4] and petitioners sought a writ of mandate directing the district court to vacate that portion of its order remanding the third through seventh causes of action to the state court.

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[2] 29 U.S.C. § 185(a).

[3] References to "A- " are to Appendices A and B of the Petition for Writ of Certiorari.

[4] Respondents also noticed an appeal of the decision dismissing their breach of covenant claim. However, in their opening brief to the Ninth Circuit, they waived their appeal of this issue. The Ninth Circuit addressed the issue of whether the covenant claim was preempted only for the purposes of establishing that federal jurisdiction existed and that therefore the case was properly removed. A-7.

Ruling on respondents' appeal, the Ninth Circuit held that the wrongful discharge claim, based on California's public policy as expressed in Cal/OSHA, was not preempted by section 301 of the LMRA or the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* In reaching this conclusion, the court correctly applied the various labor law preemption doctrines enunciated by this Court. Thus, the circuit court found no preemption under section 301 since the wrongful discharge claim is not dependent on the terms of the collective bargaining agreement but is instead based solely on the state's health and safety laws which are applicable to all workers, whether or not they are union members. A-9-10. Moreover, according to the court, allowing the state wrongful discharge claim to proceed does not interfere with conduct which Congress intended to be unregulated under the NLRA. Indeed, as the court recognized, Congress, through the federal Occupational Health and Safety Act of 1970 ("Fed/OSHA")[5], expressed its preference for state regulation of workplace safety so long as minimum standards are met. 29 U.S.C. § 667. A-10-13. Finally, the court found no preemption under the *Garmon* analysis[6] because the respondents, "as masters of their own complaint, did not allege a violation of their rights under the NLRA, but only violations of state statutes and Policy." A-8.

The Ninth Circuit denied Kaiser's petition for writ of mandate. The court carefully limited its holding to an affirmance of the district court's finding that the third through seventh causes of action, as pled, did not state claims under section 301 and therefore did not provide a basis for federal question jurisdiction.[7]

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[5] 29 U.S.C. § 651 et seq.

[6] The preemption doctrine enunciated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) exists to protect the jurisdiction of the National Labor Relations Board over activities which are arguably protected or prohibited by the NLRA.

[7] Specifically, the court held that the emotional distress claims alleged a particularly abusive manner in which the distress occurred and thus, as pled, were not preempted under *Farmer v. United Brotherhood of Carpenters and Joiners of America*, 430 U.S. 290 (1977). The court

The court noted that this finding did not preclude petitioners from asserting preemption as a defense to these claims in the state court:

> This ruling does not finally resolve the issue of preemption, which may still be raised as a defense in the state courts. Thus, if it becomes apparent that any of these causes are indeed based upon the collective bargaining agreement, the defense of preemption could be sustained.

A-14.

Thus, at this juncture in the litigation, there has been no final resolution of the preemption issue with regard to the third through seventh causes of action. It may be that upon remand the California courts will decide that preemption provides a defense to one or more of these causes of action.

REASONS FOR DENYING THE WRIT

I

THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS IN OTHER CIRCUITS BECAUSE CALIFORNIA'S OCCUPATIONAL HEALTH AND SAFETY SCHEME, UNLIKE THE STATE EMPLOYEE PROTECTIVE LAWS AT ISSUE IN OTHER CASES, IS BASED ON FED/OSHA WHICH EXPRESSLY DECLARES CONGRESS' INTENT THAT WORKPLACE SAFETY BE REGULATED BY THE STATES

A. Whether a state law claim for wrongful discharge based on a violation of Cal/OSHA is preempted by federal labor law is a question of Congressional intent. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985); *Malone v. White Motor Co.*, 435 U.S. 497, 504 (1978). Since Congress has not stated explicitly in

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further found that the claims for assault, peculiar risk and ultrahazardous activity were based on allegations of activities which violated Cal/OSHA and therefore were not dependent on the collective bargaining agreement.

the NLRA/LMRA the extent to which these statutes preempt state law, the federal courts, in most instances, must attempt to discern Congress' intent by determining whether the state law conflicts with federal law or would frustrate the federal labor scheme, or whether it is apparent from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the states. *Allis-Chalmers*, 471 U.S. at 209; *Metropolitan Life*, 471 U.S. 724. Respondents submit that the conflict among the circuits on the issue of whether certain state law claims are preempted (Petition 7, nn.2, 3, 4) is due to the varying ways in which the courts have applied these principles and the distinct preemption doctrines derived from them.

In contrast to the situations presented in the decisions cited by petitioners, determining Congress' intent with regard to the state regulation of workplace safety is not dependent on an analysis of the NLRA/LMRA or the application of the principles used to determine the preemptive reach of these statutes. Here, Fed/OSHA unambiguously sets forth Congress' position. This expression of intent may properly be relied on in determining the extent of federal labor law preemption. *New York Telephone v. New York Dept. of Labor*, 440 U.S. 519, 536 (1979); *Malone v. White Motor Co.*, 435 U.S. at 505.

Fed/OSHA makes two important points relevant to Congress' intent concerning the relationship between federal and state occupational safety laws and federal labor policy:

> 1. A federal statutory scheme which establishes minimum health and safety standards for both union and non-union workers does not conflict with, but instead is complementary to, the federal collective bargaining laws. *Marshall v. N.L. Industries*, 618 F.2d 1220 (7th Cir. 1980). This comprehensive scheme includes a prohibition on the retaliatory discharge of persons who avail themselves of the protections of Fed/OSHA, 29 U.S.C. § 660(c)(1), and provides for court enforcement of this provision by the Secretary of Labor. 29 U.S.C. § 660(c)(2); *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980); *Marshall v. N.L. Industries*, 618 F.2d 1220.

2. Fed/OSHA supplants any existing state occupational safety regulations. However, under Fed/OSHA, Congress strongly "encourage[s] the states to [re]assume the fullest responsibility for the administration of their occupational health and safety laws . . . ," 29 U.S.C. § 651(b)(11), so long as the states' scheme of regulation and enforcement is at least as vigorous as that required by Fed/OSHA. 29 U.S.C. § 667.

Pursuant to this Congressional invitation, California enacted the California Safety and Health Act, Cal. Lab. Code § 6300 *et seq.*, which was approved by the Secretary of Labor.

Thus, Fed/OSHA leaves no doubt that California's occupational health scheme, including the tort of retaliatory discharge, is sanctioned by Congress. Indeed, given the fact that Congress has delegated its authority to regulate workplace safety to California, it is more accurate to treat Cal/OSHA as if it were a federal law. When so viewed, the question is no longer one of preemption but of accommodation between two federal statutes.[8]

When faced with the problem of accommodating the NLRA/LMRA with other federal statutory schemes, this Court and the courts of appeal have uniformly concluded that the NLRA/LMRA must give way to allow for the enforcement of the other federal statute. This conclusion has been reached despite the NLRA's presumption in favor of arbitration and the exhaustion of administrative remedies. *See, e.g., Barrentine v. Arkanas-Best Freight System*, 450 U.S. 728 (1981) (Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*); *McDonald v. City of West Branch*, 466 U.S. 384 (1984) (Civil Rights Act of 1871, 42 U.S.C. § 1983); *Atchison, Topeka, and Sante Fe Ry. Co. v. Buell*, ____ U.S. ____, 107 S.Ct. 1410 (1987) (Federal Employers'

[8] See, *New York Telephone v. New York State Dept. of Labor*, 440 U.S. at 539, n.32, Opinion of Justices Stevens, White and Rehnquist. Justice Brennan in his concurring opinion in *New York Telephone* also expressed support for this position. *Id.* at 546 n*.

Liability Act, 45 U.S.C. § 51 *et seq.*);[9] *Marshall v. N.L. Industries*, 618 F.2d 1220 (7th Cir. 1980) (Fed/OSHA); *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984); *Airline Pilots Ass'n v. Northwest Airlines, Inc.*, 627 F.2d 272 (D.C. Cir. 1980) (ERISA, 29 U.S.C. § 1001 *et seq.*).

Thus, Fed/OSHA and its declaration of Congressional intent provide a basis for the Ninth Circuit's finding of no preemption which is separate and distinct from the preemption analysis in *Lingle v. Norge Division of Magic Chief, Inc.*, 823 F.2d 1031 (7th Cir.), *cert. granted*, ____ U.S. ____,108 S.Ct. 226 (1987) and *Baldracchi v. Pratt & Whitney*, 814 F.2d 102 (2d Cir. 1987). *Lingle* and *Baldracchi* reached opposite conclusions on the issue of whether section 301 of the LMRA preempts the state law claim of an employee, covered by a collective bargaining agreement, who asserts he was discharged in retaliation for filing a state worker's compensation claim. By granting certiorari in *Lingle*, this Court has decided that this conflict should be resolved.

However, contrary to petitioners' assertion, Paige and Harris' case against Kaiser is not another example of one side of this conflict. The courts in *Lingle* and *Baldracchi* decided the preemption issue under their respective interpretations of this Court's decision in *Allis-Chalmers v. Lueck*, 471 U.S. 202. In neither case was there an independent statement of Congressional intent, analogous to that which appears in Fed/OSHA, which explicitly and unconditionally sanctioned the state's implementation of a worker's compensation scheme for *all* employees. This critical difference provides a sound basis for rejecting petitioners' request the certiorari be granted in this case and argument set at the same time as *Lingle*, or, in the alternative, that certiorari be granted and the case held in abeyance pending the decision in *Lingle*. Petition 8-9, n.5.

B. Respondents also suggest that Paige and Harris' third through seventh causes of action provide an opportunity for this court to rule on a "battery" of state tort actions and therefore this

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[9] *Buell* involves accommodations of the FELA and the Railroad Labor Act (RLA). Although the RLA and the NLRA differ in certain respects, those differences do not affect the analysis here.

case creates a better vehicle for a wide-ranging exploration of federal labor law preemption than the single cause of action in *Lingle*. Petition 8. This suggestion should be rejected.

First, the Ninth Circuit's holding that the third through seventh causes of action, as pled, do not state a federal claim under section 301 is clearly correct. A-14-15. In the third and fourth causes of action for infliction of emotional distress, respondents are alleging that Kaiser and Chevron, in effect, threatened their physical well-being by requiring them to work under illegal and extremely unsafe conditions. These allegations state claims completely independent of the labor contract. Similarly, the claims for assault, peculiar risk and ultrahazardous activity are not dependent on the contract because each is based on alleged violations of Cal/OSHA. A-14-15. *Caterpiller Inc. v. Williams*, ____ U.S. ____, 107 S.Ct. 2425, 2432, n.10 (1987); *Allis-Chalmers*, 471 U.S. at 211.

Second, the Ninth Circuit limited its decision to a finding that the five claims do not arise under federal law, thus properly leaving to the state court the determination whether preemption is a defense to any of these claims. A-14. *Caterpiller Inc. v. Williams*, 107 S.Ct. at 2432-33. Given the role of the state courts, it would be premature for this Court to reach the wide range of preemption issues which petitioners urge this court to decide.[10]

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[10] Indeed, to even reach the question of preemption as a defense, the Court would need to first find that the district court had abused its discretion by remanding the five state tort claims instead of exercising pendent jurisdiction over them. Unless such an abuse is shown, the defense of preemption is not before the Court. A-15.

II

THE NINTH CIRCUIT'S DECISION PROPERLY CONCLUDED THAT SECTION 301 DOES NOT EMPOWER EMPLOYERS AND UNIONS, THROUGH THEIR COLLECTIVE BARGAINING AGREEMENT, TO ALTER THE SUBSTANTIVE STANDARDS, REMEDIES, AND PROCEDURES PROVIDED BY CALIFORNIA'S OCCUPATIONAL SAFETY LAWS

In section II of the petition, Kaiser argues that this case presents an important issue of law because the Ninth Circuit's preemption analysis erroneously imposed a "balancing" test which ignored the grievance and arbitration provisions of the collective bargaining agreement. Petition 9. This argument both misconstrues the Ninth Circuit's reasoning and misstates the law.

Reduced to its simplest terms, petitioners' argument is that section 301 empowers employers and unions, through their collective bargaining agreement, to alter California's occupational safety standards, remedies and procedures. Under petitioners' theory, there is no limit on the potential preemptive effect of collective bargaining agreements over state law—if the agreement addresses and makes arbitrable an issue that overlaps a state protective law such as Cal/OSHA, the state law, to that extent, is necessarily preempted. Thus, while Kaiser here contends only that the common law retaliatory discharge aspect of California's occupational safety scheme is preempted, the result would be conceptually identical with respect to any other provision of the law which was arguably covered by the collective bargaining agreement.[11]

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[11] The total illogic of petitioners' position can be seen from their citation, with approval, of Cal/OSHA's statutory remedy for a worker who is discharged in retaliation for complaining about safety matters. Cal. Lab. Code § 6310. Petition 5, n.1. Petitioners can offer no rationale for why the remedy under section 6310 survives preemption while the state common law wrongful discharge remedy is displaced. For purposes of preemption analysis, the two claims are identical, i.e., they both provide a state law remedy for retaliatory discharge to unionized and

Petitioners rely on this Court's recent decisions in *Allis-Chalmers*, 471 U.S. 202, and *International Brotherhood of Electrical Workers v. Hechler*, ____ U.S. ____, 107 S.Ct. 2161 (1987) to support their limitless preemption theory. Petition 10-11. This reliance is misplaced. Those cases explain the circumstances in which the federal common law governing collective bargaining agreements will preempt state claims which are not by their terms actions for breach of contract, but nonetheless are "derive[d] from the contract." *Allis-Chalmers*, 471 U.S. at 218. While holding such claims preempted, the Court was careful to point out that Congress did not intend federal labor law to displace state labor standards and remedies which are independent of the contract, i.e., standards and remedies which exist even if there is no collective bargaining agreement. *Allis-Chalmers*, 471 U.S. at 211-12.[12]

The Ninth Circuit correctly applied the teachings of this Court in holding that respondent's wrongful discharge claim was not dependent on the labor contract:

> Thus the tort of wrongful discharge in violation of public policy exists independent of any contractual right. It is true

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non-union employees. Petitioners' admission that the statutory remedy survives defeats their entire argument.

[12] As stated by the Court:

> Section 301 on its face says nothing about the substance of what private parties may agree to in a labor contract. Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever labor standards they disfavored. Clearly, § 301 does not grant parties to a collective bargaining agreement the ability to contract for what is illegal under state law. In extending the preemptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with Congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obilgations independent of a labor contract.
>
> *Allis-Chalmers*, 471 U.S. at 211-212.

See also Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. at 756.

> that Article 19 of the collective bargaining agreement states that the employer will comply with all state and federal health and safety laws, including OSHA. This incorporation of existing law does not, however, require an interpretation of the contract terms; it requires an interpretation of state law. Furthermore, allowing an employer to avoid the effects of state laws by this type of incorporation would subvert Congressional intent for the NLRA to coexist with state laws which set labor standards. *Metropolitan Life v. Mass.*, 471 U.S. at 756. The resolution of appellants' wrongful discharge claim therefore depends upon an analysis of Cal/OSHA and California tort law. Since it is not intertwined or substantially dependent upon consideration of the terms of the labor contract, it is not preempted by section 301.
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> A-10.

Because petitioners' formulation and proposed resolution of the section 301 preemption issue badly misconstrues this Court's decisions[13] and because the Ninth Circuit has properly analyzed the issue, the petition for certiorari should be denied.

III

THE NINTH CIRCUIT PROPERLY HELD THAT RESPONDENTS' WRONGFUL DISCHARGE CLAIM IN VIOLATION OF PUBLIC POLICY IS NOT PREEMPTED UNDER THIS COURT'S *GARMON* DECISION

It should first be noted that the *Lingle* decision does not involve the issue of preemption under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Consequently, petitioners'

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[13] It should be noted that the Ninth Circuit's result is not only supported by *Allis-Chalmers* and *Metropolitan Life*, but by the cases cited in Section I, *supra*, which demonstrates Congress' intent to permit federal protective law systems to coexist with the NLRA/LMRA. *See, e.g., Barrentine v. Arkanas-Best Freight System*, 450 U.S. 728 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonald v. City of West Branch*, 466 U.S. 384 (1984); *Atchison, Topeka, and Santa Fe Ry. Co. v. Buell*, ___ U.S. ___, S.Ct. 1410 (1987).

arguments based on *Garmon* do not provide a reason to grant certiorari in this case and hold it in abeyance pending the decision in *Lingle*.

Nor is there any reason to grant certiorari to review the Ninth Circuit's finding that respondents' wrongful discharge claim based on Cal/OSHA is not preempted under *Garmon*. Congress' intent to permit state regulation of workplace safety applies with equal force to the preemption analysis under *Garmon* as it does to section 301 preemption. Thus, Congress' enactment of Fed/OSHA establishes that Congress did not intend to give the National Labor Relations Board ("NLRB" or "Board") exclusive jurisdiction to decide state law occupational safety claims in situations where employees act in concert to protest working conditions which violate state regulations.

Moreover, viewed from their effect on federal labor law, it is evident that minimum state occupational safety laws are a peripheral concern of the NLRA. Although Congress created a framework within which employees can bargain collectively with their employer, *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. at 753; *New York Telephone v. New York Dept. of Labor*, 440 U.S. 529-530 (plurality opinion); *Machinist v. Wisconsin Employment Relations*, 427 U.S. 132 (1975), there is no evidence that Congress intended bargaining over minimum levels of health and safety to be part of this economic warfare. As stated by this Court in *Metropolitan Life*:

> Most significantly, there is no suggestion in the legislative history of the [NLRA] that Congress intended to disturb the myriad of state laws then in existence that set minimum labor standards, but were unrelated in any way to the process of bargaining or self-organization. To the contrary, we believe that Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety.
>
> 471 U.S. at 756.

Given Congress' intent that minimum state safety standards be left undisturbed by the federal collective bargaining scheme, it

follows that Congress did not intend to confer jurisdiction on the NLRB to resolve claims based on such state laws. The parties to a labor contract should not be permitted to frustrate Congress' intent in this regard by incorporating state occupational safety statutes into their collective bargaining agreement. This, however, would be the result if petitioners' position is accepted.

This Court's decision in *NLRB v. City Disposal System, Inc.*, 465 U.S. 822 (1984) does not support petitioners' argument. In *City Disposal*, the right not to drive unsafe trucks was a product of collective bargaining, not state law. Therefore, the driver was acting to protect rights created by and rooted in the labor contract. As *City Disposal* makes clear, such activity, if concerted, is protected by section 7 of the NLRA and subject to the jurisdiction of the Board. On the other hand, state laws, such as Cal/OSHA, that do not regulate the collective bargaining process itself, but instead provide minimum safety standards which serve as a backdrop for collective bargaining, are not preempted under the *Garmon* doctrine or any other preemption theory.

Since *Garmon* preemption is not applicable to Paige and Harris' claim for wrongful discharge in violation of public policy, there is no reason to grant certiorari to review the Ninth Circuit's decision in this regard.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Dated: December 23, 1987

Respectfully Submitted,

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